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No. 78-1891

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM LATTIMORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The question presented in this federal tax case is whether the decision below correctly imposed personal liability upon petitioners under 26 U.S.C. 6672, for their failure to collect, account for, or pay over taxes required to be withheld from the wages of their corporation's employees.

The pertinent facts may be summarized as follows: Petitioners were directors, officers, or stockholders of Savannah Inn and Country Club, Inc., a corporation that acquired and operated a hotel property (Pet. App. A-6 to A-8). The corporation failed to pay over income and FICA taxes withheld from its employees in the amount of $78,619.71 during the second and third quarters of 1969 (Pet. App. A-2). Petitioners were unaware that the taxes had not been paid until October 6, 1969. At that time,

they were so informed at a meeting with representatives of the Internal Revenue Service (Pet. App. A-11). However, petitioners were in complete control of the corporation's affairs both before and after October 6, 1969 (Pet. App. A-33).

After they became aware of the corporation's tax deficiencies, each of petitioners used corporate funds to pay and prefer creditors other than the United States. During the second and third quarters of 1969, the corporation maintained bank balances and had sufficient funds on deposit to pay the withholding taxes. During October 1969, a total of $98,869.69 was deposited in the corporation's checking account (Pet. App. A-18).

On these facts, the district court held that petitioners, as responsible officers of the corporation, had a duty to use the corporate funds available after they became aware of the tax deficiencies on October 6, 1969, to pay the tax arrearages, and that their knowing failure to do so was willful failure to pay over such taxes within the meaning of 26 U.S.C. 6672. Accordingly, it held them jointly and severally liable for the taxes under that provision (Pet. App. A-20 to A-21). The court of appeals affirmed (Pet. App. A-22 to A-36).

1. The decision below correctly held that petitioners were personally liable for the unpaid withholding taxes of their corporation.

Sections 3102(a) and 3402(a) and (d) of the Internal Revenue Code of 1954 require every employer to withhold federal income and social security taxes from the wages of his employees. Section 7501 provides that the withheld funds constitute a special trust fund in favor of the United States. If an employer withholds a tax but fails to pay it over to the United States, the employee is nevertheless

credited with having paid the tax and the government will not require any additional payment from the employee. Thus, unless the government has recourse against the person responsible for the collection and payment of the tax, the revenues would be put in jeopardy.

Section 6672 of the Code gives the government recourse against the responsible person. It imposes personal liability upon "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof * * *." The thrust of the statute is to impose personal liability upon those persons whose conduct results in the failure to pay withheld taxes. In the typical case, as here, the statute is used as a collection device against officers of a bankrupt corporation for the taxes withheld from its employees' wages.

Petitioners contend (Pet. 7-10) that their lack of knowledge of the corporation's tax deficiencies prior to October 6, 1969, absolves them from personal liability under this Court's decision in *Slodov* v. *United States*, 436 U.S. 238 (1978).

But the court of appeals correctly concluded that *Slodov* does not speak to the facts of this case. In *Slodov*, the Court held that a responsible officer was not liable for taxes withheld and dissipated prior to his assumption of control of a corporation because neither Section 6672 nor Section 7501 impresses a trust on the after-acquired funds of the corporation absent tracing of those funds to the taxes collected. Since the previous management had failed to pay over the taxes when due and had used the withheld taxes for other purposes, the Court refused to impose

Section 6672 liability upon the innocent successor officer for failure to use after-acquired funds to discharge the tax liability.

Here, by contrast, there was no change in management. Petitioners were responsible officers both before and after October 6, 1969, the date upon which they became aware of the tax deficiencies. Hence, unlike *Slodov*, there was no prior set of officers who dissipated the trust fund of taxes so that any after-acquired funds would not be impressed with a Section 7501 trust. As the court of appeals concluded, *Slodov* does not alter the rule that where there has been no change of control, responsible persons are subject to a duty to apply any available unencumbered funds to pay withholding tax deficiencies, whether or not those funds are deemed to be Section 7501 trust funds. See *Maggy* v. *United States*, 560 F. 2d 1372, 1376 (9th Cir. 1977), cert. denied, No. 77-1542 (Oct. 2, 1978); *Teel* v. *United States*, 529 F. 2d 903, 905 (9th Cir. 1976). Petitioners accordingly err in their contention that their discovery of the tax deficiencies on October 6, 1969, constituted a "change in control" on that date within the meaning of *Slodov*. Indeed, since the decision below, two other circuits have rejected such a construction of this Court's opinion in *Slodov*. See *Kizzier* v. *United States*, 79-1 USTC (CCH) para. 9373 (8th Cir. May 15, 1979); *Garsky* v. *United States*, 79-2 USTC (CCH) para. 9436 (7th Cir. June 14, 1979). In sum, since petitioners were responsible officers both before and after October 6, 1969, they must answer for their conduct throughout the entire period.

2. Petitioners also argue (Pet. 10-11) that the district court erred in granting summary judgment for the government because an issue of fact existed as to their willfulness prior to October 6, 1969, in causing the delinquency. But petitioners' state of knowledge prior to October 6, 1969, was irrelevant. The critical evidence of willfulness that triggered their liability was their failure after October 6, to use corporate funds then available to pay the tax deficiencies of which they were concededly aware. The district court's grant of summary judgment was entirely proper.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

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[1]It is well settled that there may be more than one responsible person at a given time and that two or more such persons may be held jointly and severally liable under Section 6672. See *Monday* v. *United States*, 421 F. 2d 1210 (7th Cir. 1970); *Kalb* v. *United States*, 505 F. 2d 506 (2d Cir. 1974). Petitioners therefore err in arguing (Pet. 11) that the courts below failed to recognize an issue of fact as to which of the seven petitioners were responsible and willful after October 6, 1969.